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13

14 UNITED STATES DISTRICT COURT  
15 NORTHERN DISTRICT OF CALIFORNIA  
16 SAN FRANCISCO DIVISION

17 Louis Vuitton Malletier S.A.,

CASE NO. 3:07 -cv-03763-MMC

18 Plaintiff,

**STIPULATION AND [PROPOSED]  
ORDER FOR FILING OF FIRST  
AMENDED ANSWER**

19 vs.

20 NexTag, Inc.,

21 Defendant.

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## STIPULATION

IT IS HEREBY STIPULATED by and between the parties hereto through their respective attorneys of record that NexTag, Inc. may file a First Amended Answer, a copy of which is attached hereto as Exhibit A.

5 | DATED: February 5, 2008

QUINN EMANUEL URQUHART OLIVER &  
HEDGES, LLP

0 | DATED: February 5, 2008

J. ANDREW COOMBS, A PROF. CORP.

By /s/  
J. Andrew Coombs  
Attorneys for Louis Vuitton Malletier, S.A.

**[PROPOSED] ORDER**

PURSUANT TO STIPULATION, IT IS SO ORDERED.

<sup>6</sup> DATED: February , 2008

Hon. Maxine M. Chesney  
United States District Court Judge

## **EXHIBIT A**

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

## SAN FRANCISCO DIVISION

Louis Vuitton Malletier S.A.,

CASE NO. 3:07 -cv-03763-MMC

**Plaintiff,**

**NEXTAG INC.'S FIRST AMENDED  
ANSWER AND  
DEMAND FOR JURY TRIAL**

VS.

NexTag, Inc.,

## Defendants.

Defendant NexTag, Inc. (“NexTag”) hereby answers Plaintiff Louis Vuitton Malletier, S.A.’s (“Louis Vuitton”) Complaint as follows:

19                   1. Admits that Louis Vuitton purports to state a claim for trademark  
20 infringement, contributory and vicarious liability for trademark infringement, and contributory and  
21 vicarious liability for copyright piracy.

22                   2. Admits that, as pled, this Court may exercise jurisdiction over those claims.  
23                   3. Admits that it does business in the State of California. Denies the  
24 remaining allegations contained in paragraph 3 of the Complaint

25                  4. Admits for purposes of this action only that venue is permitted in this Court,  
26 but denies the implication that this venue is the most convenient for this action.

27 5. Denies the allegation contained in paragraph 5 of the Complaint.

28 6. Denies the allegation contained in paragraph 6 of the Complaint.

1                   7. Admits NexTag received notification from Louis Vuitton asserting that  
2 NexTag was violating Louis Vuitton's intellectual property rights. Denies the remaining  
3 allegations contained in paragraph 7 of the Complaint.

4                   8. Denies knowledge or information sufficient to form a belief as to the truth  
5 of the allegations contained in paragraph 8 of the Complaint.

6                   9. Denies knowledge or information sufficient to form a belief as to the truth  
7 of the allegations contained in paragraph 9 of the Complaint.

8                   10. Denies knowledge or information sufficient to form a belief as to the truth  
9 of the allegations contained in paragraph 10 of the Complaint.

10                  11. Denies knowledge or information sufficient to form a belief as to the truth  
11 of the allegations contained in paragraph 11 of the Complaint.

12                  12. Denies knowledge or information sufficient to form a belief as to the truth  
13 of the allegations contained in paragraph 12 of the Complaint.

14                  13. Denies knowledge or information sufficient to form a belief as to the truth  
15 of the allegations contained in paragraph 13 of the Complaint.

16                  14. Denies knowledge or information sufficient to form a belief as to the truth  
17 of the allegations contained in paragraph 14 of the Complaint.

18                  15. Denies knowledge or information sufficient to form a belief as to the truth  
19 of the allegations contained in paragraph 15 of the Complaint.

20                  16. Denies knowledge or information sufficient to form a belief as to the truth  
21 of the allegations contained in paragraph 16 of the Complaint.

22                  17. Denies the allegation that NexTag is selling infringing goods and denies  
23 knowledge or information sufficient to form a belief as to the truth of the allegations contained in  
24 paragraph 17 of the Complaint.

25                  18. Denies knowledge or information sufficient to form a belief as to the truth  
26 of the allegations contained in paragraph 18 of the Complaint.

27                  19. Denies knowledge or information sufficient to form a belief as to the truth  
28 of the allegations contained in paragraph 19 of the Complaint.

1                   20. Denies knowledge or information sufficient to form a belief as to the truth  
2 of the allegations contained in paragraph 20 of the Complaint.

3                   21. Denies knowledge or information sufficient to form a belief as to the truth  
4 of the allegations contained in paragraph 21 of the Complaint.

5                   22. Denies knowledge or information sufficient to form a belief as to the truth  
6 of the allegations contained in paragraph 22 of the Complaint.

7                   23. Denies knowledge or information sufficient to form a belief as to the truth  
8 of the allegations contained in paragraph 23 of the Complaint.

9                   24. Denies knowledge or information sufficient to form a belief as to the truth  
10 of the allegations contained in paragraph 24 of the Complaint.

11                  25. Denies knowledge or information sufficient to form a belief as to the truth  
12 of the allegations contained in paragraph 25 of the Complaint.

13                  26. Denies that NexTag is a California corporation. Admits that NexTag's  
14 principal office is located in San Mateo, California and that it does business using the trademarks,  
15 names and website addresses [www.nextag.com](http://www.nextag.com) and [www.calibex.com](http://www.calibex.com). Denies knowledge or  
16 information sufficient to form a belief as to the truth of the remaining allegations contained in  
17 paragraph 26 of the Complaint.

18                  27. The Federal Rules of Civil Procedure do not allow for Doe defendants.  
19 Denies knowledge or information sufficient to form a belief as to the truth of the allegations  
20 contained in paragraph 27 of the Complaint.

21                  28. Admits that NexTag operates a comparison shopping site and that online  
22 retailers pay for traffic that originates from NexTag's website. Denies knowledge or information  
23 sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 28 of  
24 the Complaint.

25                  29. Admits that NexTag provides certain information about commercial offers,  
26 that users can use a directory or search feature, that users will often be presented with a listing of  
27 offers, and that NexTag earns a "pay per click" commission from offers clicked to through its site.

1 Denies knowledge or information sufficient to form a belief as to the truth of the remaining  
 2 allegations contained in paragraph 29 of the Complaint.

3                   30. Denies the allegations contained in paragraph 30 of the Complaint.

4                   31. Denies the allegation that NexTag “promotes its services to online  
 5 counterfeiters.” Admits that NexTag advertises its comparison shopping service and purchases  
 6 relevant keywords from certain online search engines, including the keywords “Louis Vuitton”  
 7 and “replica.” Denies knowledge or information sufficient to form a belief as to the truth of the  
 8 remaining allegations contained in paragraph 31 of the Complaint.

9                   32. Admits that Louis Vuitton has given NexTag notice asserting infringing  
 10 activities occurred and admits that NexTag’s terms of use make it a violation to use its services to  
 11 sell infringing merchandise. Denies the remaining allegations contained in paragraph 32 of the  
 12 Complaint.

13                   33. Denies the allegations contained in paragraph 33 of the Complaint.

14                   34. Denies the allegations contained in paragraph 34 of the Complaint.

15                   35. Denies the allegations contained in paragraph 35 of the Complaint.

#### **FIRST CLAIM FOR RELIEF**

17                   36. In answer to Paragraph 36, incorporates its responses to Paragraphs 1-35,  
 18 inclusive, as though fully stated herein.

19                   37. Denies knowledge or information sufficient to form a belief as to the truth  
 20 of the allegations contained in paragraph 37 of the Complaint.

21                   38. Denies the allegations contained in paragraph 38 of the Complaint.

22                   39. Denies the allegations contained in paragraph 39 of the Complaint.

23                   40. Denies the allegations contained in paragraph 40 of the Complaint.

24                   41. Denies the allegations contained in paragraph 41 of the Complaint.

#### **SECOND CLAIM FOR RELIEF**

26                   42. In answer to Paragraph 42, incorporates its responses to Paragraphs 1-41,  
 27 inclusive, as though fully stated herein.

28                   43. Denies the allegations contained in paragraph 43 of the Complaint.

1                   44. Admits Louis Vuitton's counsel sent notice to NexTag asserting infringing  
 2 activities occurred, but denies the remaining allegations contained in paragraph 44 of the  
 3 Complaint.

4                   45. Denies the allegations contained in paragraph 45 of the Complaint.

5                   46. Denies the allegations contained in paragraph 46 of the Complaint.

6                   47. Denies the allegations contained in paragraph 47 of the Complaint.

7                   48. Denies the allegations contained in paragraph 48 of the Complaint.

8                   49. Denies the allegations contained in paragraph 49 of the Complaint.

9                   **THIRD CLAIM FOR RELIEF**

10                  50. In answer to Paragraph 50, incorporates its responses to Paragraphs 1-49,  
 11 inclusive, as though fully stated herein.

12                  51. Denies the allegations contained in paragraph 51 of the Complaint.

13                  52. Denies the allegations contained in paragraph 52 of the Complaint.

14                  53. Denies the allegations contained in paragraph 53 of the Complaint.

15                  54. Denies the allegations contained in paragraph 54 of the Complaint.

16                  **FOURTH CLAIM FOR RELIEF**

17                  55. In answer to Paragraph 55, incorporates its responses to Paragraphs 1-54,  
 18 inclusive, as though fully stated herein.

19                  56. Admits that NexTag earns a "pay per click" commission for traffic directed  
 20 to websites through NexTag's site; admits that NexTag's terms of use set forth conditions for  
 21 revenue to be paid to it, and admits that NexTag's terms of use permit it to discontinue links to  
 22 websites offering products infringing the rights of third parties. Denies the remaining allegations  
 23 contained in paragraph 56 of the Complaint.

24                  57. Admits Louis Vuitton's counsel sent notice to NexTag asserting infringing  
 25 activities occurred, but denies the remaining allegations contained in paragraph 57 of the  
 26 Complaint.

27                  58. Denies the allegations contained in paragraph 58 of the Complaint.

28                  59. Denies the allegations contained in paragraph 59 of the Complaint.

1                   60. Denies the allegations contained in paragraph 60 of the Complaint.

2                   **AFFIRMATIVE DEFENSES**

3                   Without undertaking any burden it does not otherwise bear, NexTag asserts the affirmative  
 4 defenses set forth below. NexTag has not completed its investigation and discovery regarding the  
 5 facts and claims asserted by Louis Vuitton. Accordingly, NexTag reserves the right to allege other  
 6 affirmative defenses as they become known during such ongoing investigation and discovery, and  
 7 hereby reserves the right to amend its answer to allege such affirmative defenses at a later time.

8                   **FIRST AFFIRMATIVE DEFENSE**

9                   61. Louis Vuitton's Complaint fails to state a claim upon which relief can be  
 10 granted.

11                   **SECOND AFFIRMATIVE DEFENSE**

12                   62. Louis Vuitton's claims or recovery thereon are barred, in whole or in part,  
 13 because the claims were brought after the expiration of the relevant statute(s) of limitations.

14                   **THIRD AFFIRMATIVE DEFENSE**

15                   63. Louis Vuitton's claims or recovery thereon are barred, in whole or in part,  
 16 because it has a plain, common, adequate, and speedy remedy at law. The equitable claims alleged  
 17 in the Complaint are thus barred.

18                   **FOURTH AFFIRMATIVE DEFENSE**

19                   64. Louis Vuitton's claims or recovery thereon are barred, in whole or in part,  
 20 under the doctrine of laches.

21                   **FIFTH AFFIRMATIVE DEFENSE**

22                   65. Louis Vuitton's claims or recovery thereon are barred, in whole or in part,  
 23 under the doctrine of estoppel.

24                   **SIXTH AFFIRMATIVE DEFENSE**

25                   66. Louis Vuitton's claims or recovery thereon are barred, in whole or in part,  
 26 under the doctrine of waiver.

27                   ///

28                   ///

## **SEVENTH AFFIRMATIVE DEFENSE**

67. Louis Vuitton's claims or recovery thereon are barred, in whole or in part, under the doctrine of acquiescence.

## **EIGHTH AFFIRMATIVE DEFENSE**

68. Louis Vuitton's claims or recovery thereon are barred, in whole or in part, because NexTag's actions constitute fair use.

## NINTH AFFIRMATIVE DEFENSE

69. Louis Vuitton's claims or recovery thereon are barred, in whole or in part, because NexTag's actions constitute nominative use.

## **TENTH AFFIRMATIVE DEFENSE**

1                   70. Louis Vuitton's claims or recovery thereon are barred, in whole or in part  
2 because NexTag has not engaged in any willful conduct.

**ELEVENTH AFFIRMATIVE DEFENSE**

14                   71. Louis Vuitton's claims or recovery thereon are barred, in whole or in part,  
15 because Louis Vuitton has suffered no damage.

## **TWELFTH AFFIRMATIVE DEFENSE**

17                   72. Louis Vuitton's claims or recovery thereon are barred, in whole or in part,  
18 because NexTag is protected by one or more of the Digital Millennium Copyright Act Safe Harbor  
19 Provisions as codified in 17 U.S.C. §512.

## **THIRTEENTH AFFIRMATIVE DEFENSE**

21                   73. Louis Vuitton is not entitled to recover punitive damages or exemplary  
22 damages because it has failed to allege facts sufficient to state a claim for such damages.

## **FOURTEENTH AFFIRMATIVE DEFENSE**

24                   74. Louis Vuitton's claims or recovery thereon are barred, in whole or in part,  
25 because NexTag is not responsible for the actions of online retailers who infringed Louis  
26 Vuitton's rights.

27 | //

28 | //

## **FIFTEENTH AFFIRMATIVE DEFENSE**

2                   75. Louis Vuitton's claims or recovery thereon are barred, in whole or in part,  
3 because there is no special relationship between NexTag and its customers such that NexTag  
4 would be liable for the acts of its customers.

## SIXTEENTH AFFIRMATIVE DEFENSE

6                   76. Louis Vuitton's claims or recovery thereon are barred, in whole or in part,  
7 because the actions challenged by Louis Vuitton are protected by the First Amendment of the  
8 United States Constitution, and the claims and relief sought by the Complaint seek to  
9 impermissibly abridge that freedom.

## **SEVENTEENTH AFFIRMATIVE DEFENSE**

11                   77. Louis Vuitton's claims or recovery thereon are barred, in whole or in part,  
12 because and/or to the extent it failed to mitigate its alleged damages.

## **EIGHTEENTH AFFIRMATIVE DEFENSE**

14                   78. Louis Vuitton's claims or recovery thereon are barred, in whole or in part,  
15 because if granted relief, it will be unjustly enriched.

## **NINETEENTH AFFIRMATIVE DEFENSE**

17                    79. Louis Vuitton's prayer for damages is barred on the ground that such  
18 damages, if any, were not the result of acts, representations, or omissions by NexTag.

## **TWENTIETH AFFIRMATIVE DEFENSE**

20                   80. Louis Vuitton's prayer for damages is barred on the ground that the remedy  
21 for innocent infringement, if proven, is limited to an injunction against future presentation of the  
22 infringing material that would not result in delay of publication.

## **TWENTY-FIRST AFFIRMATIVE DEFENSE**

24                   81. Louis Vuitton's prayer for three times NexTag's profits is barred on the  
25 ground that Louis Vuitton has failed to allege or prove facts sufficient to show that NexTag has  
26 intentionally used Louis Vuitton's marks knowing that such marks are counterfeit marks.

WHEREFORE, NexTag prays for judgment as follows:

28 || 1. That Louis Vuitton takes nothing by way of its Complaint;

1                   2. That the Complaint, and each and every purported claim for relief therein,  
2 be dismissed with prejudice.

3                   3. That NexTag be awarded its costs of suit incurred herein, including  
4 attorneys' fees and expenses; and

5                   4. For such other and further relief as the Court deems just and proper.

6                   **DEMAND FOR JURY TRIAL**

7                   NexTag respectfully demands a trial by jury pursuant to Rule 38 of the Federal Rules of  
8 Civil Procedure on any and all issues for which it is entitled to a trial by jury.

9 DATED: February 5, 2008

10                  QUINN EMANUEL URQUHART OLIVER &  
11                  HEDGES, LLP

12                  By   
13                  Margret M. Caruso  
14                  Attorneys for NexTag, Inc.  
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